# Anthropology as the Eye of the Law - Comments on Canadian Jurisprudence

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# ANTHROPOLOGY AS THE EYE OF THE LAW

## COMMENTS ON CANADIAN JURISPRUDENCE

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## Introduction

Anthropology is a "knife, particularly effective for differentiating us from non-industrial societies, and from our own 'primitive' past" (Legendre 1985: 16). In practice, this 'knife' proves to be singularly difficult to handle. Any attempt at neat distinctions among categories such as 'non-industrial' or 'primitive' in questions of the lived law is quickly beset with ambivalence and other difficulties. With each stroke of 'the knife,' with each statement of difference, otherness or foreignness, the anthropology that deals with legal things integrates as much as it distinguishes. This transitivity is due to the fact that anthropology speaks of law in the law's own language.

In its dominant tradition, which is to say functionalist or functionalist-derived, legal anthropology is a particular sort of tool, dissecting elements worthy of legal designation from the proliferation of 'customs', 'manners', 'usages' and 'mentalities' (see Assier-Andrieu 1989). Terms such as these have often been applied as givens, deployed in the name of some ineluctable otherness that surrounds marginal populations; indeed, a large literature has developed over the years, based on these terms. It remains essential to call into question the nature of the classificatory principle by which such terms and distinctions take on importance. Certainly, some circumspection is warranted; Moore (1986: 10) has written of the conceptual problems of legal anthropology's excessive compartmentalization as a 'subdiscipline'.

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1 Translated from the original French by Carol J. Greenhouse, in consultation with the author.

Jurisprudential scholars of the 19th century, in the fashion of Maine and Morgan, committed themselves to the observation of the ways of life of people alien to west European traditions. The history of the theoretical positionings of legal anthropology - which precluded any viable challenge to a priori assumptions - is beyond the scope of this article. After more than a century, it now seems that the task of renewing the charts for productive exploration will require abandoning the academic bearings of 'legal' anthropology, in favor of searching for new ones in fresh thinking about the very categories from which legal anthropology emerges in the first place. 'See it fresh!' was Llewellyn's revolutionary call in the 1930s (Llewellyn 1930).

In this essay, we take up Llewellyn's credo as our own. My aim is to cast the central problem of legal anthropology in new terms by essentially inverting the usual approach. Conventionally, legal anthropology rests on the positivist and intrinsically dualist assumption that the law somehow transfers and articulates social relations into an active normative repertoire. My question is the opposite: If the law is not only an active normative repertoire but also a way of reading social relations, how have these premises placed anthropology in the service of the normative agenda of the state's law? To put it another way, I want to call into question - on behalf of anthropology - the category of 'law', as a complex object in its own right, constantly producing its own anthropology. Some preliminary remarks will contextualize this topic.
An illustrative case, borrowed from Canadian history, will clarify the direction and the import of the double transitivity of law and anthropology.

## Anthropology and law: Transitivity

Louis Dumont has written aphoristically that anthropology more or less consists of comparing 'them' and 'us' (1983: 13). Calling something a 'comparison' only masks other contradictory and complementary operations. For the sake of describing and analyzing other societies and cultures, anthropologists must simultaneously unsettle the most familiar concepts from their own native environment. One recalls telling passages from *Structures elementaires* in which Levi-Strauss explicates the exchanges of Christmas gifts and cards in Anglo-saxon America in light of the Alaskan potlatch, and depicts the institution of reciprocity by the encounter of "two strangers who face each other, less than a meter apart, across the table in a cafeteria" (1967: 65-66, 68-69).

While decoding distant ways of life, anthropologists infuse their observations with what Marcus and Fischer call "the hidden critical agenda" in their encounter with their own culture (1986: 111). Sometimes the project of repatriating the ethnologist's insight first acquired elsewhere becomes an explicit

tactic: Dumont in *Homo Aequalis* (1977), Balandier in *The detour* (1985) and Schneider in *American kinship* (1968), to cite only these well known examples. Always, a certain deconstruction of preliminary concepts of observation is integral to the ethnographic enterprise, either as the stated objective or as an obligatory form of wording. This ambiguous virtue is today confronted directly. Exteriority, distance, "the view from afar" (to quote Levi-Strauss, quoting Rousseau) are without doubt no longer the synonyms of objectivity that they once were; they are signs of the equivocal character of anthropology's campaign to acquire some new status. For the discipline, this deconstructive project is, in effect, an extra ace that allows the discipline systematically to juxtapose - as oppositions - the categories of modern thought and categories for making sense in other cultures. This process inevitably redefines value as well as context.

And what is anthropology, in the eyes of the law? A fairly common approach would link the utilitarian quality of anthropology in court to a deviation from its natural objective scientific path; such a deviation might be militant or servile in political terms. Anthropological observation and knowledge lay claim - *a priori* - to autonomy and a principled objectivity; the endpoints of their elaboration, their potential uses, their objects of inquiry are not deemed appropriate questions in themselves, nor relevant vantage points for reflecting on anthropology's substantive findings - let alone molding its syntax. But anthropology's utility to a judicial order or legal doctrine might not involve a misuse or distortion of its otherwise-immaculate products. Where jural matters are concerned, the very structure of anthropology's 'eye' - its mode of perceiving and translating reality - may well be the eye of the law.

In this essay, on quite the other hand, I propose to attend to the doubly transitive relationship between aims of anthropology and law. My hypothesis is that the law does not take the other into consideration except to the extent that it resembles the self. My conclusion is that the responsibility of anthropology only begins with the facts, behaviors, and forms of organization to which it assigns meaning within a legal framework. The case of the Canadian Nishga, which we cite as an extended illustrative case, puts this theatre of legal intelligibility on center stage, where the doctrinal discourse of the law (*jurisprudence*) and of anthropological science blend together to form a common field of interpretation.

## The Nishga case: Intimations of legality

Between 1969 and 1973, for the first time in their history, Canadian courts decided a case on the basis of indigenous legal theory, in spite of a judicial history and ideology which saw the conquered lands as devoid of any human enterprise worthy of respect. The question the courts asked themselves was

retrospective: did the Amerindians and Inuit have *rights* - and what sort of rights - before *contact*? This reflection on the past constituted a preamble for all decisions relative to the contemporary recognition of specific rights for these populations. In order to prove that these rights had been able to survive a legislation, jurisprudence, and administration that had denied them, it was necessary to stage an idealized return to the original encounter between the politico-jural organization of the conquest and indigenous peoples. For indigenous populations, modern science demonstrated (in contrast to the legal tradition) that they lived in a viable society on soil only later become Canadian. We are going to present the givens of this singular conversion in an effort to isolate its principal logical axes (cf. especially Asch 1984, Carsen 1978, Hawley 1984, Harding 1966).

Between 1969 and 1973, then, several decisions were handed down relevant to what was called the *Nishga claim*, from the name of the Indian nation in British Columbia that put the case before the tribunals, or the *Calder case*, from the name of the chief who represented the tribe before the Supreme Court. These decisions solemnly mark the entry of autochthonous rights into the Canadian legal order, by means of an *a posteriori* assertion of the existence of such rights at the moment of contact.

## The English legal doctrine of aboriginal rights before 1969

To assess these developments, we must return to two decisions that had previously controlled the general doctrine regarding the legal status of indigenous populations - and, in spirit, thoroughly alien to their belated recognition. The first, *Calvin's case* from 1608, developed a philosophy that denied any right and all rights to these populations:

> If a Christian King should conquer a kingdom of an infidel, and bring them under his subjection, there *ipso facto* the laws of the infidels are abrogated, for that they be not only against Christianity, but against the law of God and of nature. (cited in Asch 1984: 43)[2]

In this text, reference to the 'laws' of the infidels involves a generic term for customs, beliefs and institutions, not a formal recognition of the existence of law. The 'laws' are abrogated by the superior authority of Christian royalty not only because they are at variance with Christianity but also because the divine and natural order is the unique source of legality. In spite of the fact that they

2 Tr. note: In English in author's text.

might have been indigenous lifeways, native practices are legally intolerable for the sole reason that they are *socially unintelligible*. That is, indigenous people are foreign to the mode of perceiving the order of man and the world that operates in the house of the conquering power.

It took until 1919 before a new jurisprudence perceptibly modified this initial conception of indigenous law. It came from the *Judicial Committee of the Privy Council*, the highest court of the British Empire, charged with hearing cases on appeal from the highest courts of the colonies and dominions - and, in so doing, unifying the colonial and English law (Harding 1966: 300 seq.). On the subject of a suit involving the indigenous populations of Southern Rhodesia, the high court made this pronouncement concerning the general means of recognizing the rights of autochthonous peoples:

> The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the ideas of civilized society. Such a gulf cannot be bridged.
> (...) On the other hand, there are indigenous peoples whose legal conceptions, though differently developed, are hardly less precise than our own. Once they have been studied and understood they are no less enforceable than rights arising under English law. (*In re Southern Rhodesia* (1919) A.C. 211: 223)[3]

Frequently cited and amply discussed by legal anthropology, only part of this decision has been analyzed. The first part of the opinion has been accorded great importance, for example by Michael Asch, as evidence of the steadfast ethnocentrism of a judge who has done no more than substitute 'civilization' for 'Christianity', and who has kept alive the spirit of Calvin's case (1984: 43). In defense of his own principle of the universality of the legal function, Malinowski (1934: xxix) similarly made the claim that one can distinguish - as if across an unbridgeable abyss - the tribes at the bottom of the ladder of progress and developed societies. The notorious 'such a gulf cannot be bridged'[4] without doubt irritates every anthropologist. Anxious to underscore the cultural obscurantism of the most eminent British jurists, anthropological authors have tended to cast this declaration of exclusion in bold relief - and to misread the

3 Tr. note: In English in author's text.
4 Tr. note: In English in author's text.

second part of the 1919 judge's reasoning, which establishes an actual *system of recognition.*

In the 1919 opinion, the high court affirmed that "usages and concepts of rights and duties" of certain tribes *are not reconcilable* with the ideas and institutions of a civilized society. In addition, the opinion gives indications of the manner in which such comparative stock-taking might be done. Affirming the unbridgeable gulf for some, the court gives others the roadsign to a route of access: certain tribes have legal concepts that are different from ours, but they are no less applicable *once they have been studied and understood.*[5]

That English doctrine should know and comprehend these foreign legal ideas is presented as a prerequisite to their '*reconcilability*' with imperial law and, accordingly, their applicability by the courts. Thus, the denial of law among tribes deemed insufficiently civilized, which served the Privy Council as preamble, cannot legitimately be held to be (as has often been claimed) the argument essential to its purpose. More important is the premise of an enactment that is in itself extremely revealing of the true nature of a conquering power's evolving legal ideology with regard to problems of indigenous rights.

While he sarcastically criticized this jurisprudence (though commenting on only its first part), Malinowski - paradoxically - tended to conform to its basic logic. In a passage reminiscent of the 1919 judge's opinion, Malinowski (1934: xxix) wrote: "The anthropologist cannot simply tell the administrator that primitive law and civilized law have nothing in common. The anthropologist must discover their greatest common denominator." Now, this is precisely what the court indirectly invited anthropologists to do, in the second part of its opinion.

The analysis of the English court is not without its hidden traps and contradictions. It implies that since the study of indigenous peoples potentially renders their jural concepts comprehensible and applicable, one should accordingly search for the basis of 'study' along the fault line dividing less civilized societies (that is, the unintelligible) from the others, recognition of whose laws permits them to be effectively placed under British administration and jurisdiction. It must be said that this division is arbitrarily imposed by the judge. As has already been suggested, and as we will analyze further below, the anthropology of 'customary laws and indigenous institutions' will acquit itself energetically, following a discipline that is more or less conscious of this task of *translating* that which is entrusted to it by jurisprudence. Anthropology's project sometimes respected the divide established by the doctrine of 1919 - for

5 Tr. note: English phrase in authors text.

example, Radcliffe-Brown (1933), and sometimes rejected it - as with Malinowksi and his numerous functionalist heirs. One must not ignore the fact that these rival orientations of the scientific movement, and even the domination of the second, were in effect conceived, foreseen and desired by an imperial jurisdiction.

The decision of 1919 substituted (in sum) the possibility of a procedure for acknowledging indigenous legal systems for the prior negation - pure and simple - of indigenous law in Calvin's case. Calvin's case had made indigenous laws literally *unthinkable* by the Imperial state. That procedure could run on its own given an underlying principle of universality of the potential legality of human groups - provided that one could materialize the law in terms compatible with the terms of pre-existing law. In this way, the hypothesis of autochthonous law was put forward, and its proof left in the hands of extralegal professionals qualified to study it and deliver up its knowledge.

The jurisprudence relative to the Canadian Nishga case fits the theoretical framework established by this precedent, in basing its legal appreciation of autochthonous law on anthropological testimony as to its existence.

*The Nishga case: 1969.*

It is useful to examine the arguments raised in the course of the litigation phase of this case more closely. The Nishga case was the subject of three judgments, in 1969, 1970 and 1973. The facts were quite simple, but their treatment gave rise to widely divergent interpretations. The Nishga sued for recognition of their freedom to collectively use and occupy their fishing, hunting and trapping territory. Pleading against the government of the province of British Columbia, which denied them all basis to a claim, the lawyers for the Nishga based their claim on three points:

1) at the moment of contact, the Nishga had a land use system that was compatible with Canadian law;
2) the sovereign power preserved pre-existing rights for the Indians of this province;
3) neither colonial law, nor, since its establishment, the Canadian government had expressly abolished these rights.

The second and third points comprise arguments of law raised by the opposing side - the conquering power - and which define the terms of any possible debate. We will return to them later. The first point, which goes to the very heart of the 1919 doctrine, is designed precisely for a double operation of 'filling the law with fact' (to borrow the felicitous expression of Simone Goyard-Fabre (1972: 75)) and inserting the fact into the law. Indeed, it means bringing the social

forms of an indigenous population in their pristine state and the sophisticated law of a modern industrial state - both of which happen to exist in the same territory - into each other's presence. In other words, the problem (as constructed by the court) is to bring the suit of a group of Indians from the west coast, living in the 18th or 19th century, before a tribunal of the 20th century. The principal drafter of this singular manipulation of history was not a jurist but an anthropologist.

Before the court of first instance, Wilson Duff, a specialist in the Nishga, relied on testimony gathered among living members of the tribe in affirming that at the moment of contact, the Nisha had a system of land use that was, according to the actual terms reported by Michael Asch, "*reconcilable with Canadian law*" (1984: 47). The criterion introduced by the Privy Council in the imperial court of 1919 resurfaced to the letter in the discourse of this scientist testifying before a British Columbian court in 1969. But what logic does this literal convergence of legal doctrine and scientific observation express? The anthropologist basically adopted a reasoning process elaborated by legal theorists, and placed before him in the context of this lawsuit. This process channelled his reflections; he resisted, as against a tight harness, the structure of ideas that would later lead to a particular jural result.

As expert witness, a role which makes the anthropologist into the most reliable of servants, the anthropologist is committed to the analogy posed by the judges as the *sine qua non* of the recognition of indigenous peoples' rights. Faithful to the mission entrusted to anthropologists since Malinowski (*op. cit.*) in 1934, and in perfect harmony with the thesis of the judges of 1919, the expert searches for parallels in the jural forms of the native and the sovereign; however, it is the law of the sovereign that defines the criteria of comparison and which, finally, decides whether the proof has been sufficient. In affirming some aspect of native American life - no matter what it might be - is 'reconcilable with Canadian law', the anthropologist takes on the heavy responsibility of translating or demonstrating the translateability of aboriginal institutions into the language of a normative rhetoric whose natural vocation is to transform their nature over the short or long term. The law's transformative role is more or less the same with regard to all social relations that it sets out to identify and define.

At the same time, the anthropologist brings 'the view from afar'. He or she speaks a language of objectivity: this, too, offers legal doctrine a most effective counterpoint. When the anthropologist adopts the idea of *reconcilability* between autochthonous and Canadian legal institutions as a theoretical horizon, he or she simultaneously gives a scientific yardstick to a legal concept that cannot compare two societies without preserving the domination of one over the other. In this way, he or she steadfastly articulates the principle that makes Canadian law into a frame of reference for all other forms of law. The principle also presupposes

that one can imagine that the forms of social life most alien to the west might be comprised in the legal categories of a modern state. At the end of this double intellectual operation, law becomes a fact, an anthropological finding. Inversely, the fact of a relationship between the social organization of the Nishga and their land becomes law, an admissible claim under Canadian legislation.

The opposing side, pleading for the government of British Columbia, avoided contesting this global evaluation of the situation in order to fix on a technical point. In their eyes, what the Nishga might have had or not had by way of aboriginal title was of no relevance to the case since, eventually, their title was extinguished by several land use acts during the colonial period (that is, before the formation of the Canadian federation). The intellectual process here, too, is fairly distinctive in that it casts doubt on the verifiable existence of native title to the land but also affirms that it was 'the general intent of the legislation' to eradicate a pre-existing native title (cf. Asch 1984: 48). Thus, the government's side in effect manages to preclude the anthropologist's proceeding by analogy - without having to take on the risks of proof. Along these same lines, the judge of the court of first instance rendered a decision involving a similar degree of paradox in 1969, asserting that if an 'aboriginal title' had ever existed, it had been extinguished by subsequent acts of the sovereign's authority. This response to point 3 of the Nishga argument (see above) allowed a partial resolution of the case while failing to rule on points 1 and 2. With regard to those points, the unilateral activity of the colonial administration removed the original 'dialogue' between the indigenous social conditions and the initial politics of the conquering order from the dossier. Following the lead of the provincial executives' order, the judge refused to consider whether, *at the moment of contact*, there was a legal system capable of reconciliation with *contemporary* Canadian law. He reasoned that the very constitution of this law itself, as viewed through the acts of government, placed this question beyond the courts, making it a question for the erudite debates of historians and ethnohistorians.

*The Nishga case: 1970.*

In May, 1970, the Court of Appeal of British Columbia affirmed this first judgment, not only on the basis of an extinction of original rights by colonial legislation, but also by their assessment of the potential reconcilability of Nishga customs with Canadian law. Michael Asch reports the opinion of Chief Justice Davey for the court:

> ...in spite of the commendation of Mr Duff, a well-known anthropologist, of the native culture of the Indians on the mainland of British Columbia, they were undoubtedly at the time of settlement a very primitive people with few of the

> institutions of civilized society, and none at all of our notions of private property. (cit. 48-49)

Once again, jurisprudential thinking took on the colors of paradox. On the one hand, the judge affirmed the extinction of eventual rights by virtue of a succession of legislative acts against them. On the other hand, he also took pains to demonstrate the legal nonexistence of such rights by reference to the comparative procedure that could be used as evidence since 1919. Placing himself rigorously at the level of reasoning of the anthropologist-expert under oath, the judge arrived at precisely opposite conclusions. Justice Davey wrote:

> I see no evidence to justify a conclusion that the aboriginal rights claimed by the successors of these primitive peoples are of a kind that it should be assumed the Crown recognized them when it acquired the mainland of British Columbia by occupation. (*ibid.*)

One can see that the idea of comparability and reconcilability between native culture and the occupying society rests on the notion of a *threshold of civilization*, valued in particular in reference to the comparison of land tenure regimes. Informed by the anthropologist's expert testimony, the provincial court decided on the basis of the same facts, but in the opposite way. Whether that option remains formally or rhetorically open is an interesting question.

If one steps back a bit, one can observe two universes of meaning that history has created separately: an Amerindian culture and the legal system from a former British dominion. By virtue of a case, these two universes confront each other, each placed in the other's gaze. At the very least, this is an idealized view, since the thought of the one is from the outset within the sights of the other. The suit is not the stage for a contest of cultures, since the point of view of the Nishga - such as it survived across the testimony of the anthropologist (and that testimony, in turn, survived the argument of the lawyers) - was itself a constructed response to the legal demands of the State. Thus, the Nishga reproduced to the letter a conceptualization that allows one to *predict* the outcome of the comparison. Any latitude in evaluating the situation is entirely contained within the legal doctrine that imposes comparison on that which is judged to be comparable. It is not a question of considering the reality of a territorial mode of existence of the Nishga, but of isolating specific elements of it in order to certify them under Canadian law. From this selective process, of requalification and connection to categories of reference, the jurist remained his own only master. His intellectual mastery applied itself even more effectively than that of the anthropologist, accepting the orientation of his purpose around

the notion of *reconcilability*, and gratified by an appearance of scientific legitimacy.

*The Nishga case: 1973.*

The decision finally rendered by the Supreme Court of Canada in 1973 was not any more favorable to the Nishga than earlier judgments, but the reasoning of the opinion had enormous consequences for the courts' recognition of the rights of native populations. In effect, the court ruled negatively in 1973 on the grounds that the privileged immunity of the Crown had never been waived in British Columbia. Having put the Crown - symbol of sovereignty - directly in dispute, the Nishga needed special authorization from the Lieutenant Governor of Canada to plead their case. Contrary to the sentiment of a jurist such as Carsen (1978), this case nevertheless permitted the Supreme Court to assess the nature of the prerogatives claimed by the native populations at their foundations. In this case, the court agreed unanimously that native rights existed at the moment of contact, but they divided over the question of whether these rights survived colonial legislation. In contrast to continental jurisdictions, the decisions of Anglo-American courts *en banc* allow divided opinions among the judges; these dissenting opinions remain important as points of reference, especially in the Supreme Court, even when they have not been determinative in the final judgment.

With regard to the first point, concerning Nishga property law at the moment of contact, lawyers for the Nishga had to evoke the intrinsic characteristics of these laws, such as they were understood in the historical context of contact. They also had to depict the initial attitude of the sovereign power toward indigenous laws, in order to advance the second point regarding the sovereign's preservation of Indians' pre-existing rights. In practice, these two points were inextricably related.

A royal proclamation of October 7, 1763, following the Treaty of Paris, seemed clearly to recognize and guarantee the use of the land by natives in the disputed territories:

> ... it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom we are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them as their Hunting Ground (...)

> And We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under Our Sovereignty, Protection and Dominion, for the use of the said Indians, all the Lands and Territories not included within the Limits of Our said three new Governments, or within the Limits of the Territory granted to the Hudson Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the sea from the West and North West as aforesaid. (Carsen 1978: App. I, 75-79)[6]

Even though three of the seven judges concluded that British Columbia was well within the lands and territories which stretch from the west of the river sources and extending into the sea on the west and the northwest the argument sought in *recognition* by the sovereign power went only part of the way in establishing a legal basis for native sovereignty. Indeed, Amerindian title was not deemed to have derived from the Crown's consideration in the 18th century, but from the fact that the Nishga possessed an "aboriginal usufructuary interest"[7] on these lands (cf. Carsen 1978: ss 100).

The use of this terminology calls to mind the Blackstonian conceptions on the evolution of property: first, common property for the group, that is, transitory and usufructuary rights for individuals; later, the "exclusive right of a man to possess that which formerly belonged to the general body of the society" (Blackstone 1774 II: 206). According to this great English jurisprudential scholar, several American nations remained in "the original state of simplicity" where "general recognition of property sufficed for men" (*Ibid.* 199). Thus, even the earliest doctrine recognized a strict kinship and even an authentic filiation between the property regimes conceptualized by the 'first Americans' and the Crown, the colony, and the empire which was later Canadian.

In 1973, when the high court invoked the idea of an *aboriginal usufructuary interest*, it thereby subscribed to an eminent tradition in doctrinal thought. Even so, the aspect of that tradition that had the heaviest impact was its operational character, in the evaluation of facts. As Judge Judson concluded: "...the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means..." (cited in Asch 1984: 49-50).[8] Relying on this assessment

6 Tr. note: Quotations are in English in author's text.
7 Tr. note: English phrase in author's text.
8 Tr. note: In English in author's text.

that corroborated the expertise of Wilson Duff, the Supreme Court ruled against the court of appeal of British Columbia, affirming that at the moment of contact, the Nishga had rights that were reconcilable with Canadian law.

It remained to determine if these original rights could have endured to the present day. As noted above, the court was divided. Certain members of the panel thought that the "State's acts" - expressions of sovereignty emanating from the conquering power - prevailed in a general and absolute way, precluding the possibility that native rights might in some way be maintained under this empire and even claim to limit its scope. Other judges considered that once established, no title could be extinguished by single general enactments but only by specific suppressing legislation. In support of this thesis, the opinion of a United States Supreme Court justice was particularly cited, involving the Apache Lipans tribe: "Indian title is maintained in the absence of a clear and absolute indication in the public record that it was the intention of the sovereign power to deprive the tribe of all its property rights" (cited in Asch: 51). In default of a special declaration abrogating Nishga rights, these were therefore presumed never to have been extinguished. This permitted the court (Mr. Justice Hall) to enunciate a general principle for the treatment of documents and historic facts:

> The assessment and interpretation of historical documents enactments tendered in evidence must be approached in the light of present-day research and knowledge, disregarding ancient concepts formulated when understanding of the customs and cultures of our original people was rudimentary and incomplete. (*ibid.*: 50)[9]

Without doubt, this is a direct response to the court of appeal judges, themselves prisoners of the representations of their nineteenth century predecessors, who had found the Nishga too primitive to qualify for admission into legal forms. Mr. Justice Hall's opinion is also an hommage to anthropological knowledge, expressly consecrated as the judicial method of interpretation.

In this way, the court neatly divides a dilemma with a paradox. The dilemma resides in the very construction of a legal ruling on the territorial claims of the Nishga. On the one hand, it is necessary to refer to an original situation, that is, an anterior state of affairs prior to contact with western disruptions in order to grasp the question. On the other hand, in order to be able to consider the legal question, it is necessary to render this pristine state reconcilable with the legal concepts of the imperial State. The paradox is that this image of authenticity is

9 Tr. note: In English in author's text.

one produced by the State, as is the view of the processes of change whereby indigenous populations were socialized by a transforming power. Furthermore, these constructions somehow prevail without reintroducing authenticity itself as a question. Authenticity is indispensable to this historical preamble.

Now this insertion is conceivable in legal terms only through the jurisprudence of 1919 and, in the full meaning of Judge Hall's statement, it is intellectually conceivable only because of the progress of knowledge in the twentieth century. Paradoxically, the judge of 1973 had to revive a scene already ended, denied by the earlier judges and especially ignored by governments and administrators who owed them a judgment: one must judge the past by the law of the present. Legal evolution is firmly associated with the accumulation of scientific knowledge. Since then, anthropology appears to be an essential cog in the success of the syncretic project to which jurists have committed themselves. That project unveils the original scene, where the native legal identity was revealed - or created - and connects it to the contemporary practices that drive Indian claims.

## Conclusion

The Nishga appeal was denied more for procedural reasons than fundamental substantive ones. In spite of that, the decision of the Supreme Court of Canada on the Calder case, on January 31, 1973, constituted an immense step forward in the cause of indigenous nations. Prior to the Calder case, jurisprudence had used a formal grid for reading colonial history that was faithful to the intentions of the colonists. The Calder case replaced this with a substantive method of interpretation that approached 'contact' with the guidance of an anthropological reconstitution of an indigenous point of view. Thus, the jurisprudence in the Calder case affirmed simultaneously the existence, the validity and the persistence of Nishga territorial rights. More broadly, this decision from a high court demonstrated, as Asch has underscored, that a possibility existed that native peoples still possessed original rights that a contemporary court might recognize and affirm.

To summarize the Calder case, it is the jurisprudence of 1919 plus anthropology. The requirement of *reconcilability* - once a blank canvas - is finally filled. It now becomes an active legal principle once it is possible to establish a *community of meaning* among differing terms, that is, taking them together and considering them according to a single mode of comprehension. A cultural trickster, anthropology brings tribal wildness into the quiet seas of Roman concepts and categorizations. As we have seen, in establishing a hierarchy of levels of civilization among societies in 1919, the Privy Council cast certain natives into a sphere of unremitting legal otherness; it also raised the possibility

of legally recognizing the primitive law of certain societies with the condition that sufficient *similarities* be proven vis-a-vis a specific image of law - an image always available in the state of the conquering power as a constant point of reference.

Anthropology is susceptible to serving the legal order or legal doctrine not only because of the nature of its product but also, it seems, because of the very structure of its research process. In providing the courts with a technology for reading culture, anthropology is the eyes and ears of an intellectual and institutional legal system that is capable only of informing and transforming itself through the grids, models or frameworks it produces and masters. The anthropologist examines in depth that which is different so that the jurist can disclose what might be sufficiently similar to be made an object of analogy in the law. Without respite, legality calls science to the bar, summoning anthropology on the pretext of seeking some means of the law's certainties and extending its horizon of competence.

The judge of the Supreme Court of Canada tells us that it is "the present state of science and knowledge that must service as guide for reading" the judicial acts since the first contact with the Indians, including those by which the present case can be interpreted. Anthropology thereby serves in its turn as a referential discourse for a mode of thought constrained to reconstruct history so as both to capture it for the present and, eventually, to continue to produce it. As for law and anthropology, jurisprudence has as much internal ground for scientific thought as the latter has for the legal process; the Nishga case bears vivid witness to this double transitivity.

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